

NOV 3 2006

BEFORE THE FEDERAL ELECTION COMMISSION

COMMISSION
SECRETARIAT

In the Matter of:

SENSITIVE -3 P 12:09

David Vitter for U.S. Senate and
William Vanderbrook in his official
capacity as treasurer

MUR 5587R

GENERAL COUNSEL'S REPORT #3

I. ACTIONS RECOMMENDED

Find probable cause to believe that David Vitter for U.S. Senate and William
Vanderbrook in his official capacity as treasurer violated 2 U.S.C. § 441d

II. BACKGROUND

On March 7, 2006, the Commission found reason to believe that David Vitter for U.S.
Senate and William Vanderbrook, in his official capacity as treasurer, ("the Committee"),
violated 2 U.S.C. § 441d of the Federal Election Campaign Act of 1971, as amended ("the Act").
The finding was based on information indicating that the Committee made disbursements for two
sets of phone banks, but did not include a disclaimer on the calls. At the time of the reason to
believe finding, the available information led to the conclusion that the Committee potentially
spent as much as \$338,257 on the two sets of calls.

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Based on the information before the Commission, we are prepared to recommend that the Commission find probable cause to believe that the Committee violated 2 U.S.C. § 441d.

III. FACTUAL SUMMARY

The Committee hired a polling and voter identification company to conduct telephone banks on behalf of the Committee. Two sets of calls are at issue in this matter. One consisted of advocacy and voter identification calls. At the beginning of each call, the callers informed the recipient that s/he was "working with the David Vitter for U.S. Senate Campaign." The caller then explained, "I have decided to work to elect David Vitter because he has worked hard to bring good jobs to Louisiana[,] . . . has a concrete record of fighting political corruption [a]nd

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1 fully supports the Bush tax cuts;" asked the recipient of the call if "David Vitter [can] count on
2 your vote on election day;" and asked what issue the recipient considered to be the most
3 important issue facing our nation today. The caller ended by stating, "Thank you for your time
4 and we really do hope you will consider David Vitter for U.S. Senate when you go to vote." The
5 caller never stated that the Committee paid for the calls.

6 A second group of calls are referred to as the "Undecided" poll calls. It appears that the
7 recipients of these second calls were individuals who indicated in the first set of calls that they
8 were undecided voters. In the "Undecided" poll calls, the caller stated that they were from "PJB
9 Media Research," which was a d/b/a name of the company hired to make the calls. The callers
10 simply asked the recipient, "In the U.S. Senate Race (sic) in November are you more likely to
11 vote for:" and then listed the names of the candidates, including David Vitter. The callers were
12 instructed to rotate the order they read the candidates' names when making the calls.

13 Information provided by the Committee indicates that more than 500 calls were made
14 within a thirty (30) day period, that the Committee spent approximately \$228,000 on the first set
15 of calls (approximately 400,000 calls at \$.57 per call), and that the Committee spent
16 approximately \$51,300 on the second set of calls (approximately 90,000 calls at \$.57 per call).
17 See Affidavit of Kyle Ruckert dated June 26, 2006 ("Ruckert Aff."), ¶¶ 5-6. Therefore, it
18 appears that the Committee spent a total of \$279,300 on both sets of calls.

19 IV. LEGAL ANALYSIS

20 The Act requires that political committees "making a disbursement for the purpose of
21 financing any communication . . . through any other type of general public political advertising"
22 must place a disclaimer in the communication. 2 U.S.C. § 441d. Furthermore, the regulations
23 state that any "public communication" for which a political committee makes a disbursement
24 must contain a disclaimer. 11 C.F.R. § 110.11.

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1 A public communication includes a communication by telephone bank to the general
2 public. 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. A telephone bank means that more than 500
3 calls of an identical or substantially similar nature were made within a 30-day period. 2 U.S.C.
4 § 431(24); 11 C.F.R. § 100.28. The Explanation and Justification discussing the disclaimer
5 regulations implementing the 2002 Bipartisan Campaign Reform Act ("BCRA") amendments to
6 the Act also make clear that a telephone bank is considered a type of general public political
7 advertising. *See* Explanation and Justification, 67 Fed. Reg. 76962, 76963 (Dec. 13, 2002)
8 ("E&J") ("each form of communication specifically listed in the definition of 'public
9 communication,' as well as each form of communication listed with reference to a
10 'communication' in 2 U.S.C. 441d(a), must be a form of 'general public political advertising.'").
11 Therefore, any candidate, political committee or their agent(s) making any disbursement for
12 telephone bank calls must include a disclaimer on the calls.

13 The disclaimer must be presented in a "clear and conspicuous manner" in order to give
14 the listener "adequate notice of the identity of the person or political committee that paid for and,
15 where required, that authorized the communication." 11 C.F.R. § 110.11(c)(1). A disclaimer, if
16 paid for and authorized by a candidate or an authorized committee of a candidate, must clearly
17 state that the communication has been paid for by the authorized political committee. 11 C.F.R.
18 § 110.11(b)(1).

19 In sum, disclaimers are required on any telephone bank communications, without regard
20 to their content, for which a political committee makes a disbursement. The required disclaimer
21 must state who paid for the calls. Here, the Committee paid for both sets of calls, but neither
22 included the required disclaimer.

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1 The Committee contends that the first set of calls made clear that the Committee paid for
2 the calls and that the Commission's attempt to require use of certain "magic words" in a
3 disclaimer is unsupported by law. *See* Committee Response to Probable Cause Brief
4 ("Response"), pp. 2-3. We agree that the first set of calls clearly discussed David Vitter and the
5 "David Vitter for U.S. Senate Campaign," but they never stated who *paid for* the calls, as
6 required by explicit language of the Act. *See* 2 U.S.C. § 441d(a)(1) ("shall clearly state that the
7 communication has been paid for by such authorized political committee"). The calls here
8 simply stated that the caller was "working with the David Vitter for U.S. Senate Campaign," but
9 in no way conveyed who or what entity paid for the calls.²

10 The Committee also appears to argue that its purported identification of the Committee as
11 sponsor of the calls was adequate because, for express advocacy communications such as these,
12 nothing changed following the passage of BCRA. *See* Response, pp. 2-3 (discussing
13 Explanation and Justification and Notice of Proposed Rulemaking for post-BCRA 11 C.F.R.
14 § 110.11). To some extent, this is a *non sequitur* because, both before and after BCRA, certain
15 communications were required to state who paid for them. BCRA also added two newly defined
16 terms to the Act: "public communication" and "telephone banks." After BCRA, the Commission
17 chose to clarify the scope of section 441d by specifically stating that a disclaimer was required
18 on, among other things, "all *public communications* for which a political committee makes a
19 disbursement." 11 C.F.R. §110.11(a)(1) (emphasis added). Thus, where prior to BCRA there
20 may have been uncertainty as to whether section 441d applied to phone banks, after BCRA, the
21 Commission removed the doubt.

² For example, an individual may make a call that states the person is "working with the John Smith Committee," but that call could be paid for by another entity and authorized by the John Smith Committee. *See* 2 U.S.C. § 441d(a)(2). By only stating that the caller was "working with" the John Smith Committee, the caller would not have fully disclosed who paid for the calls.

1 The Committee further argues that neither it “nor a small company such as McRei, Inc.,
2 which has been making thousands of phone calls for federal campaigns over a period of many,
3 many years would be on notice of any change in Commission policies, regulations or
4 interpretations by virtue of the Commission’s own publications and statements.” *See* Response,
5 p. 5. But this assertion ignores the extensive discussion in the E&J for the disclaimer
6 regulations. In the E&J, the Commission recalled that, in its Notice of Proposed Rulemaking, it
7 had “noted that one effect of using the consistent terminology of ‘public communication’ to
8 describe the 2 U.S.C. 441d(a) communications would be that ‘telephone banks to the general
9 public’ would be subject to the disclaimer requirements.” *See* E&J, 67 Fed. Reg. at 76963. It
10 then proceeded to explain why the final rules did exactly that. *Id.*³

11 The Committee also asserts that the information as to who sponsored the calls was clear,
12 conspicuous, was not difficult to hear, and the placement was not easily overlooked.
13 *See* Response, p. 4. However, the references in the Act and regulations to “clear and
14 conspicuous” relate to discussions of whether a person hearing or seeing the communication in
15 question could actually see or hear a disclaimer, such as whether font size is too small to read or
16 whether the disclaimer is spoken too quickly to be understood. As stated previously, while the
17 calls certainly clearly and conspicuously referenced David Vitter and the “David Vitter for U.S.
18 Senate Campaign,” the calls did not state that the Committee paid for the calls as required by the
19 Act.

³ The Committee also acknowledges that “general public political advertising,” a term used in section 441d to describe the section’s scope, is also in the definition of “public communication” (and incorrectly attributes that choice to the Commission, rather than Congress). Nevertheless, it appears to argue that the Commission acted contrary to Congressional intent because Congress intended “a more specific concept of ‘advertising,’” defined as requiring only identification of the “sponsor” of the calls to apply to section 441d. *See* Response, pp. 3-4. However, the Committee provides no further support for or explanation of this assertion other than to quote without further comment, an “Adverse Report together with Minority Views” from the Committee on House Administration, which uses the word “advertising” in the section titled “Summary of the Legislation, Section-By-Section Description.” H.R. Rep. 107-131(I).

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1 With respect to the second set of calls, the Committee claims that, because the calls were
2 "polling calls" and did not contain advocacy or intend to identify specific votes or voters, these
3 calls were not governed by section 441d. *See* Response, p. 6. The Committee also claims that

4 statutory reference to 'phone banks' does not extend to telephone calls which are
5 made for polling or research purposes, or to ascertain trends, overall percentages
6 of support, tracking calls to determine the effectiveness of the campaign's
7 advertising or the candidate's progress or the status of the campaign itself.
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9 *See* Response, p. 6. Notably, this assertion does not contain any citation, a point effectively
10 acknowledged by the Committee immediately thereafter when it states, "No discussion of this
11 type of telephone communication exists *anywhere* in the legal or legislative history of BCRA."
12 *See id.* (emphasis in original). The Committee further asserts that, if "anyone" had considered
13 that BCRA would require disclaimers on polling calls, "there would have been a specific
14 exemption" in the Act. *See* Response, p. 6. Again, there is no citation to support this assertion,
15 and the Commission must be guided by the clear language of the statutes and regulations, not the
16 speculation of Respondent's counsel. Second, Congress, in defining "public communication"
17 and "phone bank," and the Commission, in promulgating its corresponding regulations, did not
18 incorporate an analysis of the content of calls prior to determining that they were part of a phone
19 bank; rather, the only requirements for the calls to be considered a phone bank are those set forth
20 by Congress in the Act, specifically that the calls were substantially similar in nature and totaled
21 more than 500 over the course of 30 days, which is the case here.

22 The Committee cites Advisory Opinion ("AO") 1999-27 as evidence that the
23 Commission has historically never required a disclaimer on polling calls and states that, "[f]or
24 the Commission to now depart from this reasoning without any notice to the regulated
25 community is unacceptable." *See* Response, p. 7 (emphasis in the original). As a result, the
26 Committee claims that the Commission is abusing its discretion and not providing due process to

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the Committee because it promulgated these regulations without advising the regulated community. *See* Response, pp. 7-8. First, AO 1999-27, an opinion rendered pre-BCRA, is inapplicable here. That advisory opinion concerned a presidential preference "straw poll" held in conjunction with a state party's precinct caucuses that began the process of selecting the state's delegates to the party's national convention. The "straw poll" was an event, not a communication, and therefore there was no suggestion in the opinion that it required a disclaimer. Thus, AO 1999-27 is entirely inapposite to this matter, and does not stand for the proposition for which Respondent cites it. The Commission did hold in AO 1999-27 that, in the absence of express advocacy, advertisements urging voters to attend the caucuses and participate in the straw poll would not require a disclaimer, but that conclusion had nothing to do with polling because no pre-BCRA communication required a disclaimer absent express advocacy or a solicitation.

Accordingly, we recommend that the Commission find probable cause to believe that the David Vitter for U.S. Senate Committee and William Vanderbrook, in his official capacity as treasurer, violated 2 U.S.C. § 441d.

V.

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VI. RECOMMENDATIONS

1. Find probable cause to believe that David Vitter for U.S. Senate and William Vanderbrook, in his official capacity as treasurer, violated 2 U.S.C. § 441d.

2.

11/2/06
Date

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